Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1575

SAMUEL DeMILIA, President of the Patrolmen's Benevolent Association of the City of New York and all other Police Officers of the City of New York similarly situated,

Petitioner,

against

THE STATE OF NEW YORK, LOUIS LEFKOWITZ Attorney General, HUGH CAREY, Governor of the State of New York, MAYOR EDWARD KOCH, on behalf of the City of New York CHAIRMAN ARVID ANDERSON, on behalf of the Office of Collective Bargaining,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

BRIEF FOR RESPONDENTS, THE STATE OF NEW YORK, ROBERT ABRAMS, ATTORNEY GENERAL AND HUGH L. CAREY, GOVERNOR OF THE STATE OF NEW YORK, IN OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	5

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Opinions Below

The decision of the Court of Appeals of the State of New York denying leave to appeal is reported at 48 N Y

* Since the commencement of this action, Charles Peterson has succeeded to the presidency of the Patrolmen's Benevolent Association and Robert Abrams has succeeded to the office of Attorney General of the State of New York.

2d 611; —— N.). 2d —— and N.Y.S. 2d ——, and appears at Appendix "A" to the petition. The opinion of the Appellate Division of the Supreme Court, First Department is reported at 72 A D 2d 536, 421 N.Y.S. 2d 70 and appears at Appendix "B" to the petition. The opinion of the Supreme Court, New York County is reported at 96 Misc 2d 77, 412 N.Y.S. 2d 953 and appears at Appendix "C" to the petition.

Jurisdiction

The Court of Appeals denied petitioner's motion for leave to appeal from the order of the Appelate Division on January 8, 1980 the petition for certiorari was filed on April 8, 1980, *i.e.* ninety-one days later. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Statement of the Case

This is an action for a declaratory judgment in which the president of the union representing non-supervisory New York City police officers, sought to declare unconstitutional portions of the State Financial Emergency Act for New York City. Petitioner pursues before this Court his claim that the special restrictions imposed upon "impasse arbitrators" contained in Section 7(3) of the Act (21a)* deny to petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution, because he is treated differently from police officers who serve in other parts of the State, pet. p. 2.

Although the Supreme Court, Special Term, found for the defendants on the merits (10a-11a), the Appellate

* Numbers in parentheses followed by "a" refer to pages of the appendix to the petition.

Division of the Supreme Court, First Department, directed dismissal of the complaint on the ground that there was no justiciable controversy; there being no collective bargaining impasse proceedings pending at the time (4a). The New York Court of Appeals denied leave to appeal from the order of the Appellate Division (1a-3a).

REASONS FOR DENYING THE WRIT

I.

The petition for certiorari was not timely filed. The order of the New York Court of Appeals denying leave to appeal from the order of the Appellate Division of the Supreme Court was entered on January 8, 1980. The petition for certiorari was filed on April 8, 1980, *ninety-one* days later. The failure to file the petition within the ninety-day period provided in 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rules, Rule 22(3), without previously obtaining an enlargement of time, places and matter beyond the jurisdiction of the Court, *Deal* v. *Cincinnati Board of Education,* 402 U.S. 962 (1976); *Teague* v. *Regional Commissioner of Customs, Region II,* 394 U.S. 977 (1969).

II.

The decision of the Appellate Division directing dismissal of the complaint for want of a justiciable controversy (3a), was based upon its interpretation of New York law regarding the jurisdiction of state courts to render declaratory judgments. This independent and adequate state ground for the decision precludes review in this Court, see *Zacchini* v. *Scripps Howard Broadcasting Co.,* 433 U.S. 562 (1977).

III.

Assuming, *arguendo,* that the federal question presented by the petition were properly before this Court, petitioner has, nonetheless, failed to present a substantial issue warranting full briefing and argument.

The differences in the collective bargaining laws applicable to police officers in New York City as compared to those in the rest of New York State do not constitute invidious discrimination. All New York City employees are subject to the New York City Collective Bargaining Law, New York City Admin. Code § 1173-4.0(a) and are treated equally in the area of impasse arbitration by section 7 of the Financial Emergency Act, N.Y. L 1975, ch 868 as amended by N.Y. L 1978, ch 201 subsection 23.3 (21a).

Rationally-based territorial differences in the application of state law are clearly permissible, see e.g., *North* v. *Russel,* 427 U.S. 328, 338-339 (1976); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973). Disparate treatment of the City of New York *vis a vis* the rest of the State was specifically upheld in *Manes* v. *Goldin,* 400 F. Supp. 23, 29-30 (E.D.N.Y. 1975), aff'd 423 U.S. 1068 (1976).

The precarious financial situation of the New York City government and the need for special fiscal controls was recognized by the State Legislature in the Financial Emergency Act, *supra,* and by the Congress in the New York City Loan Guarantee Act of 1978, PL 95-339, Aug. 8, 1978; 92 Stat. 460. A statute that requires an arbitrator considering a wage increase for public employees to give weight to the City's ability to pay is unquestionably justified.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York
May 20, 1980

Respectfully submitted,

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